

SATHISVARAN CHANDRASEGARAN**A****v.****AGILAN VANMUGELAN & ANOR**

COURT OF APPEAL, PUTRAJAYA

B

RAUS SHARIF PCA

SULONG MATJERAIE JCA

AZIAH ALI JCA

[CIVIL APPEAL NO: P-04-477-2010]

22 MARCH 2012

C

TORT: *Negligence - Personal Injury - Treatment in private hospital - Claim for medical expenses paid by insurer - Appeal against - Whether appellant liable to reimburse 1st respondent - Whether 1st respondent suffered loss from payment of his medical expenses - Out of pocket expenses - Whether Sessions Court judge erred in his decision - Khairul Sham Ahmad & Anor v. Yesudass Michaelsamy*

D

TORT: *Damages - Special Damages - Personal injury - Treatment in private hospital - Claim for medical expenses paid by insurer - Appeal against - Whether appellant liable to reimburse 1st respondent - Whether 1st respondent suffered loss from payment of his medical expenses - Out of pocket expenses - Whether s. 28A(1) of the Civil Law Act 1956 applicable - Whether Sessions Court judge erred in his decision - Khairul Sham Ahmad & Anor v. Yesudass Michaelsamy*

E**F**

The respondents were involved in a road accident and had sought treatment from Gleneagles Medical Centre ('the hospital') for the injuries sustained by them. The 1st respondent's medical expenses were paid by Prudential Assurance Malaysia Bhd ('the insurer') whereas the 2nd respondent paid for his own medical expenses. The High Court affirmed the Sessions Court's decision wherein both the respondents' claim against the appellant for their medical expenses was allowed. Dissatisfied with the said decisions, the appellant appealed. The issue that arose for consideration herein was whether the appellant was liable to reimburse the 1st respondent's medical expenses incurred at the hospital where the same had been paid by the insurer. The appellant submitted that he should not be made liable to pay for the 1st respondent's medical expenses since it was paid by the insurer and not by the 1st respondent. On the other hand, the 1st respondent relied on the case of *Sin Hock Soon Transport Sdn Bhd & Anor v. Low King*

G**H****I**

A *Ban* which referred to the case of *Frank Astle Ward v. Malaysian Airlines System Bhd* ('*Frank Astle*') and submitted that the High Court was right in upholding the decision of the Sessions Court which allowed the 1st respondent's claim for medical expenses even though the amount had already been paid by the insurer.

B **Held (allowing the appeal; setting aside order of the High Court)**

Per Raus Sharif PCA delivering the judgment of the court:

C (1) The case of *Frank Astle* dealt with the issue of deductibility in respect of payment for loss of earnings which was a part of general damages. In situations as such, s. 28A(1) of the Civil Law Act 1956 ('the Act') has clearly stated that insurance payments are not deductible. Whereas, in the present case, the 1st respondent's claim was for medical expenses incurred while undergoing treatment at the hospital. Hence, *Frank Astle* and s. 28A(1) of the Act had no application to this case. (paras 7 & 12)

E (2) The sum paid for the medical expenses were out of pocket expenses and was therefore special damages. The test to apply in a claim for special damages would be whether the 1st respondent had incurred those expenses or had paid an amount which resulted in a loss to him. Since the 1st respondent did not pay the medical expenses, he suffered no loss and therefore, was not entitled to such claim. Further, to allow such claim would tantamount to facilitating the 1st respondent's enrichment and it would be contrary to the universal rule that he is not allowed to recover something which he has not lost (*Khairul Sham Ahmad & Anor v. Yesudass Michaelsamy*; foll). (para 14)

Bahasa Malaysia Translation Of Headnotes

H Responden-responden telah terlibat dalam satu kemalangan jalan raya dan telah mendapat rawatan daripada Gleneagles Medical Centre ('hospital') bagi kecederaan-kecederaan yang dialami oleh mereka. Perbelanjaan perubatan responden pertama telah dibayar oleh Prudential Assurance Malaysia Bhd ('pihak insurans') manakala responden kedua telah menanggung perbelanjaan perubatannya dengan sendiri. Mahkamah Tinggi telah mengesahkan keputusan Mahkamah Sesyen di mana tuntutan kedua-dua responden terhadap perayu untuk perbelanjaan perubatan mereka telah dibenarkan. Tidak puas hati dengan keputusan tersebut,

perayu telah merayu ke mahkamah ini. Isu yang bangkit untuk pertimbangan di sini adalah sama ada perayu bertanggungjawab untuk membayar ganti rugi perbelanjaan perubatan responden pertama di mana perbelanjaan tersebut telah pun dibayar oleh pihak insurans. Perayu berhujah bahawa beliau sepatutnya tidak boleh dijadikan bertanggungjawab untuk membayar perbelanjaan perubatan responden pertama memandangkan ianya telah dibayar oleh pihak insurans dan bukannya oleh responden pertama. Sebaliknya, responden pertama bergantung kepada kes *Sin Hock Soon Transport Sdn Bhd & Anor v. Low King Ban* yang merujuk kepada kes *Frank Astle Ward v. Malaysian Airlines System Bhd* ('Frank Astle') dan berhujah bahawa Mahkamah Tinggi telah dengan betul mengesahkan keputusan Mahkamah Sesyen dalam membenarkan tuntutan responden pertama bagi perbelanjaan perubatannya walaupun amaun tersebut telah pun dibayar oleh pihak insurans.

Keputusan (membenarkan rayuan; mengenyepikan perintah Mahkamah Tinggi)

Oleh Raus Sharif PMR menyampaikan penghakiman mahkamah:

- (1) Kes *Frank Astle* telah membincangkan isu berkaitan pemotongan bagi kehilangan pendapatan yang terdiri daripada gantirugi am. Dalam situasi sebegini, s. 28A(1) Akta Undang-Undang Sivil 1956 ('Akta') telah dengan jelasnya menyatakan bahawa bayaran insurans tidak boleh dipotong. Manakala, dalam kes semasa, tuntutan responden pertama adalah untuk perbelanjaan perubatan yang telah ditanggung semasa mendapat rawatan daripada hospital. Oleh itu, kes *Frank Astle* dan s. 28A(1) Akta tidak boleh dipakai dalam kes ini.
- (2) Jumlah yang dibayar untuk perbelanjaan perubatan adalah belanja hangus dan oleh itu, merupakan gantirugi khas. Ujian untuk dipakai dalam suatu tuntutan bagi gantirugi khas adalah sama ada responden pertama telah menanggung perbelanjaan tersebut atau pun membayar amaun itu yang telah menyebabkan kerugian kepada beliau. Memandangkan responden pertama tidak membayar perbelanjaan perubatannya, beliau tidak mengalami sebarang kerugian dan oleh itu, tidak layak bagi tuntutan itu. Lagipun, dengan membenarkan tuntutan tersebut akan memudahkan pengkayaan responden pertama dan perkara ini adalah bertentangan dengan peraturan universal bahawa beliau tidak dibenarkan untuk menuntut sesuatu yang tidak hilang kepadanya.

- A Case(s) referred to:**
Frank Astle Ward v. Malaysian Airlines System Bhd [1991] 3 CLJ 2053;
[1991] 1 CLJ (Rep) 117 SC (**not foll**)
Khairul Sham Ahmad & Anor v. Yesudass Michaelsamy [2005] 2 CLJ 195
HC (**foll**)
- B** *Sam Wun Hoong v. Kader Ibramshah* [1981] 1 LNS 103 FC (**refd**)
Sin Hock Soon Transport Sdn Bhd & Anor v. Low King Ban [2006] 5 CLJ
265 HC (**not foll**)
- Legislation referred to:**
Civil Law Act 1956, s. 28A(1)(a), (c)
- C** *For the appellant - Sunita Kaur Sandhu; M/s Ajmer Sandhu & Ong*
For the respondent - M Karuppanan; M/s Agusti Ismadi & Karu

*[Appeal from High Court, Pulau Pinang; Civil Appeal No: 12-121-2009
MT 3]*
- D** *Reported by Kumitha Abdul Majid*

JUDGMENT

- E Raus Sharif PCA:**
- Introduction**
- F** [1] This is an appeal by the defendant against the decision of the High Court at Penang dated 28 July 2010 in dismissing the defendant's appeal and upholding the decision of the learned Sessions Court Judge at Georgetown in allowing both the plaintiffs' claim for medical expenses for the treatment of injuries suffered in a road accident.
- G** [2] We heard the appeal on 24 November 2011 and 17 February 2012. After hearing the parties, we adjourned the matter for our consideration and decision. We now give our decision and the reasons for the same.
- H** [3] The facts are not in dispute. The plaintiffs suffered injuries arising out of a road accident. They both sought private medical treatment at Gleneagles Medical Centre. The costs of the medical expenses incurred in respect of the 1st plaintiff was RM60,768.74 and the 2nd plaintiff was RM17,806.55. The medical expenses in
- I** respect of the 1st plaintiff was paid by Prudential Assurance Malaysia Bhd ("Prudential Assurance") to Gleneagles Medical Centre while 2nd plaintiff paid for his own medical expenses.

[4] The only issue argued in this appeal is whether the defendant is liable to reimburse the 1st plaintiff's medical expenses incurred at the Gleneagles Medical Centre where the same has been paid by the Prudential Assurance.

[5] Learned counsel for the defendant submitted that the defendant should not be liable to compensate the 1st plaintiff for the medical expenses incurred by him. It was argued that the medical expenses incurred by the 1st plaintiff was out of pocket expenses and since it was not paid by the 1st plaintiff, he was not kept out of pocket. Thus, the defendant should not be made to pay for medical expenses that was already paid by Prudential Insurance. In support, he relied on the High Court case of *Khairul Sham Ahmad & Anor v. Yesudass Michaelsamy* [2005] 2 CLJ 195 where Faiza Tamby Chik J held as follows:

*I think special damages means "out of pocket expenses" which consists of money incurred or paid by the plaintiff, which amounts to a "loss" to the plaintiff. During the trial at the Sessions Court, the plaintiff testified that he incurred a medical bill of RM40,000.00 and the said bill was paid by ACE General Insurance Bhd. his personal insurers. Therefore it is my opinion that the plaintiff's medical bill does not amount to out-of-pocket expenses. It was not paid by the plaintiff and therefore was not a loss to the plaintiff. Hence, the learned Sessions Court Judge has erred in law in awarding the plaintiff for the sum of RM30,000.00. The learned Session's Court Judge's action has enriched the plaintiff by RM30,000.00 out of this accident. In the case of *Parry v. Cleaver* referred above, Lord Reid held that "*British the Transport Commission v. Gourley* (1) did two things. With regard to the first question it made clear, if it had not been clear before, that it is a universal rule that the plaintiff cannot recover more than he has lost. And, more important it established the principle that in this chapter of the law we must have regard to realities rather than technicalities." The plaintiff admitted during examination-in-chief that his insurer paid for his medical bill. He did not pay the bill himself. He incurred no expenses with respect to the medical bill. Therefore, he has no right to be compensated for the said bill ... Hence it is clear that the plaintiff cannot claim for the medical expenses paid by the insurance company because the rights to recover the medical expenses lies in the hand of his insurer. The medical expenses of RM30,000.00 awarded by the learned Sessions Court Judge has enriched the plaintiff. The enrichment has violated the philosophy behind the principle of compensatory damages upheld by this country. Therefore such an award shall not be allowed.*

A [6] Learned counsel for the 1st plaintiff argued otherwise. He submitted that the High Court was right in upholding the decision of the Sessions Court Judge in allowing the 1st plaintiff's claim for medical expenses, even though the amount had already been paid by Prudential Assurance. He referred to us the case of *Sin Hock*
B *Soon Transport Sdn Bhd & Anor v. Low King Ban* [2006] 5 CLJ 265, where Zakaria Sam J held that the decision of Faiza Tamby Chik J in *Khairul Sham Ahmad (supra)* was decided without benefit of the learned judge being referred to the Supreme Court case of *Frank Astle Ward v. Malaysia Airlines System Bhd* [1991] 3 CLJ 2053; [1991] 1 CLJ (Rep) 117 and s. 28A(1)(c) of the Civil Law Act 1956 ("CLA").
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[7] Obviously, there are two conflicting decisions of the High Court on this issue. We have read and re-read the two cases and the other authorities submitted to us and we are of the view that
D the approach taken by Faiza Tamby Chik J in *Khairul Sham Ahmad (supra)* is the correct approach. With respect, we are unable to agree with the observation by Zakaria Sam J in *Sin Hock Soon Transport Sdn Bhd (supra)* that had Faiza Tamby Chik J been referred to the case of *Frank Astle Ward (supra)* and s. 28A(1) of the CLA, Faiza Tamby Chik J would have come to a different conclusion. We are of the view that *Frank Astle Ward (supra)* and s. 28A(1)(a) of the CLA has no application to the facts of the present case.
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F [8] In *Frank Astle Ward (supra)*, the appellant, an Australian national, was at the material time employed under a contract of service by Malaysia Airlines System (MAS) as a pilot in East Malaysia Rural Air Services operating in Sabah and Sarawak. It is an agreed fact that on 6 July 1982, the appellant was a pilot of a
G Norman Islander aircraft flying from Long Somado to Lawas in the Fifth Division of Miri, Sarawak. When the said aircraft developed engine trouble, thus, causing the appellant to make an emergency crash landing on a football field at Long Baya near Lawas. As a result, the appellant suffered head injury and other minor injuries.
H At the hearing in the High Court, MAS admitted liability at 100% and the only issue was the quantum of damages, both general and special. The learned High Court judge assessed damages for the appellant a sum of RM301,250. However, the learned High Court judge ordered a deduction of RM300,000 which the appellant had
I received from an insurance company under a general accident policy taken by MAS for the benefits of the appellant and other employees under the terms of their contract of employment, thereby leaving a judgment sum of only RM1,250.

[9] The appellant appealed to the Supreme Court, amongst others, challenging the validity or legality of the deduction of RM300,000 from the accident insurance policy taken by MAS. Mohamed Azmi SCJ, speaking for the Supreme Court at p. 126 said:

In ordering the deduction, the learned judge relied principally on the House of Lords case of *Hussain v. New Taplow Paper Mills Ltd* [1988] 2 WLR 266, and [1988] 1 All ER 541, and *Nabi v. British Leyland (UK) Ltd* [1980] 1 WLR 529; [1980] 1 All ER 667. It would appear that on the question of deductibility, His Lordship applied the simple test of who paid for the premium of the insurance policy. We regret to say that the law in England on deductibility is not that simple. In fact, there the law on this subject is so unsettled that Parliament has intervened with a compromise solution by providing in some instances that half of certain payment, over a period can be deducted in assessing the loss, for example, s. 2 of the Law Reform (Personal Injuries) Act 1948. But this type of solution is not open to any Court where the statute is silent. The guiding principle governing decision in border line situation is that , “The common law has treated this matter as one depending on justice, reasonableness and public policy (per Lord Reid in *Parry v. Cleaver* [1967] 3 WLR 739, CA; [1970] AC 1 at p. 13).

[10] Mohamed Azmi SCJ, further pointed out that in Malaysia the issue of deductibility was addressed by Parliament by the introducing s. 28A(1)(a) in the CLA which provides:

28A.(1) In assessing damages recoverable in respect of personal injury which does not result in death, there shall not be taken into account:

- (a) any sum paid or payable in respect of the personal injury under any contract of assurance or insurance, whether made before or after the coming into force of this Act;

[11] His Lordship then addressed the issue in the following manner:

To put the issue of deductibility beyond doubt in the present appeal, our Parliament has fortunately for the appellant, introduced s. 28A(1)(a) by Act A308 which came into force on 30 May 1975. The intervention of the new provision goes beyond introducing mere solution against deductibility. We agree with Mr RK Nathan (as he then was) that the plain meaning of the word

- A used in that section should be adopted for the purpose of interpretation. Adopting the strict rule of interpretation, our Parliament in its wisdom has made it crystal clear that any sum paid or payable in respect of personal injury which does not result in death “under any contract of assurance or
- B insurance” shall not be taken into account in assessing damages. By providing no exception, the effect would be to eliminate altogether deductibility even in border line situations although the injured person has not directly contributed to the insurance scheme.
- C [12] It is clear that in *Frank Astle Ward (supra)*, the issue of deductibility, arose in relation to payment in respect for the loss of earnings which forms part of general damages. And s. 28A(1) of the CLA has clearly stated that such insurance payments are not deductible. That is not the situation here. In the present case,
- D the claim of the 1st plaintiff is for the medical expenses incurred while undergoing treatment at Gleneagles Medical Centre.
- E [13] We are of the view that the sum paid for medical expenses in the sum of RM60,768.74 are out of pocket expenses and are therefore special damages. As to what are special damages we can do no better than to refer to the words of Mohamed Azmi J (as he then was) in *Sam Wun Hoong v. Kader Ibramshah* [1981] 1 LNS 103 wherein he said:
- F Special damage consists of out-of-pocket expenses, such as hospital bills and actual losses of earning during period of total incapacity, and is generally capable of substantially exact calculation.
- G [14] In *Khairul Sham Ahmad (supra)*, Faiza Tamby Chik J referred to *Sam Wun Hoong v. Kader Ibramshah (supra)* and said:
- I think special damage means ‘out-of-pocket expenses’ which consists of money incurred or paid by the plaintiff, which amount to a “loss” to the plaintiff.
- H Therefore the test to apply in a claim for special damages would be whether the 1st plaintiff has incurred that expenses or has paid an amount, which is a loss to him. The undisputed facts revealed that medical expenses of RM60,768.74 was paid by the Prudential Assurance. Since 1st plaintiff did not pay the medical expenses, he
- I incurred no expenses with respect to the medical expenses. In other words, the medical expenses did not come from the pocket of the 1st plaintiff. He suffered no loss and therefore, he is not

entitled to such claim. To allow such claim, would in our view tantamount to facilitating the 1st plaintiff's enrichment and it would be contrary to the universal rule that he is allowed to recover something which he has not lost.

[15] For the above reasons, we allow the appeal with costs. The order of the High Court in affirming the order of the Sessions Court ordering the defendant to pay the 1st plaintiff RM60,768.74 is hereby set aside.

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